91-894

Supreme Court, U.S.
FILED
NOV 27 1991
OFFICE OF THE CLERK

No. 91 -

In The

**SUPREME COURT OF THE UNITED STATES**

October Term, 1991

---

DANIEL McCARTHY, et al.,

Petitioners,

v.

SCOTT EMERSON FELIX,

Respondent.

---

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

Daniel E. Lungren, Attorney General
of the State of California
George Williamson, Chief Assistant
Attorney General
Karl S. Mayer
Deputy Attorney General
(Counsel of Record)
Susan Duncan Lee
Deputy Attorney General
455 Golden Gate Avenue, Suite 6200
San Francisco, CA 94102
Telephone: (415) 703-1732

Attorneys for Petitioners

---

## QUESTION PRESENTED

Does a correctional officer's single shove to a prisoner in 1985, motivated by anger but causing only slight bruising and pain, present such a clear violation of the Eighth Amendment that the case must now go to a jury trial?

## LIST OF PARTIES

Petitioners are Paul Ward, Gregory Maxie, and Luis Lemos.[1/] In March 1985, at the time of the alleged events that are the basis of this action, Ward was a correctional sergeant, and Maxie and Lemos were correctional officers, at San Quentin State Prison in California. Respondent is Scott Felix, a California state prisoner.

---

[1]Daniel McCarthy, the former Director of the California Department of Corrections, was dismissed from this action by order of the District Court.

## Table of Contents


| | Page |
|---|---|
| QUESTION PRESENTED | |
| LIST OF PARTIES | |
| OPINIONS BELOW | 2 |
| JURISDICTION | 2 |
| CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED | 3 |
| STATEMENT OF THE CASE | 4 |
| REASONS FOR GRANTING THE WRIT | 7 |
| I. THE NINTH CIRCUIT'S DECISION IN THIS CASE CONFLICTS WITH PRINCIPLES STATED IN SUPREME COURT CASES ON QUALIFIED IMMUNITY | 7 |

II. THE NINTH CIRCUIT'S DECISION IN THIS CASE CONFLICTS DIRECTLY WITH DECISIONS OF THE FIFTH CIRCUIT HOLDING THAT A PRISONER MUST SHOW A "SIGNIFICANT" INJURY TO STATE A CLAIM FOR EXCESSIVE FORCE UNDER THE EIGHTH AMENDMENT, AN ISSUE THAT IS PENDING BEFORE THIS COURT IN *HUDSON v. McMILLIAN* 11

III. THE NINTH CIRCUIT'S DECISION IN THIS CASE CONFLICTS WITH THE PRINCIPLE THAT THE EIGHTH AMENDMENT DOES NOT RECOGNIZE MINOR DEPRIVATIONS IN THE NATURE OF COMMON-LAW TORTS 15

CONCLUSION 19

APPENDIX

Ninth Circuit Opinion A-1

USDC's Order Denying Motion for Summary Judgment A-8

Ninth Circuit Order Denying Rehearing A-14

## Table of Authorities


| Cases | Page |
|---|---|
| Anderson v. Creighton<br>483 U.S. 635 (1987) | 8 |
| Harlow v. Fitzgerald<br>457 U.S. 800 (1982) | 8, 9 |
| Huguet v. Barnett<br>900 F.2d 838 (5th Cir. 1990) | 12 |
| Ingraham v. Wright<br>430 U.S. 651 (1977) | 15 |
| Johnson v. Glick<br>481 F.2d 1028 (2d Cir. 1973) | 15, 16 |
| Malley v. Briggs<br>475 U.S. 335 (1986) | 8 |
| Meredith v. Arizona<br>523 F.2d 481 (9th Cir. 1975) | 7, 11 |
| Mitchell v. Forsyth<br>472 U.S. 511 (1985) | 2, 6 |
| Rhodes v. Chapman<br>452 U.S. 337 (1981) | 18 |
| Scheuer v. Rhodes<br>416 U.S. 232 (1974) | 8 |
| Whitley v. Albers<br>475 U.S. 312 (1986) | 15 |

## Table of Authorities, cont'd

Wilson v. Seiter, ___ U.S. ___,
111 S. Ct. 2321 (1991) 17, 18

Wise v. Carlson
902 F.2d 417 (5th Cir. 1990) 12

Wood v. Strickland
420 U.S. 308 (1975) 8

**Statutes**

28 United States Code section 1254(1) 2

28 United States Code section 1291 2, 6

42 United States Code, section 1983 3

No. 91 -

In The

**SUPREME COURT OF THE UNITED STATES**

October Term, 1991

---

DANIEL McCARTHY, et al.,

Petitioners,

v.

SCOTT EMERSON FELIX,

Respondent.

---

**PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT**

---

Petitioners, Gregory Maxie, Paul Ward and Luis Lemos, pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit, filed in this proceeding on July 10, 1991.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 939 F.2d 699 (1991), and is reproduced in the Appendix submitted with this petition. Appendix, pp. A-1 - A-7.

The United States District Court's order denying petitioner's motion for summary judgment on grounds of qualified immunity was not published. The District Court's order is reproduced in the Appendix. Appendix, pp. A-8 - A-13.

## JURISDICTION

The United States Court of Appeals for the Ninth Circuit filed its opinion on July 10, 1991. The Court of Appeals denied petitioners' timely petition for rehearing and suggestion for rehearing *en banc* on August 30, 1991. Appendix, p. A-14. This petition is timely filed within 90 days of August 30, 1991.

The jurisdiction of this Court to review the decision of the United States Court of Appeals for the Ninth Circuit is invoked under 28 United States Code section 1254(1).

The United States Court of Appeals for the Ninth Circuit had jurisdiction to review the District Court's denial of summary judgment on qualified immunity grounds under 28 United States Code section 1291 and *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const., amend. VIII:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const., amend. XIV, § 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 United States Code, § 1983:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

## STATEMENT OF THE CASE

On December 6, 1985, Scott Felix, a California state prisoner, filed a civil rights action under 42 United States Code section 1983 alleging numerous violations of his civil rights by various prison officials. On August 7, 1986, the District Court dismissed a number of Felix's claims, including claims that he was verbally harassed, "stressed out," oppressed, threatened, and slandered by a number of various correctional officers. However, the District Court found that Felix stated a claim against Correctional Sergeant Ward for assault, and ordered service on Ward.

On September 11, 1986, Felix filed an affidavit amending his complaint, alleging that Correctional Officers Gregory Maxie and Luis Lemos also participated in the assault. Felix demands declaratory and injunctive relief, as well as $2 million damages against Ward, and $200,000 each against Maxie and Lemos. All parties have demanded jury trial. After dismissing more of Felix's claims, the District Court ordered service on Maxie and Lemos.

Felix makes the following allegations: One day in early 1985, Felix was assigned to work in the infirmary at San Quentin State Prison, where he was incarcerated. Officer Maxie ordered Felix to repeatedly mop a floor, and when Felix objected that he had already mopped the floor clean, Officer Maxie spat on the floor and ordered Felix to mop it again. When Felix refused, Officer Maxie handcuffed him (pressing him against a wall for the

purpose of applying the handcuffs) and escorted him to Sgt. Ward's office, verbally harassing him along the way.

In the hallway outside of Ward's office, near the entrance to the prison's emergency room, Felix and Officer Maxie waited for Sgt. Ward to become available. When Sgt. Ward approached, Officer Maxie told Sgt. Ward that Felix was refusing to work. Felix told Sgt. Ward that Officer Maxie was crazy and that Maxie was lying. At that point, Felix alleges, Officer Maxie "threw me up against the wall" across the hallway, seven to nine feet away. The left side of Felix's face and his left shoulder hit the wall. Officers Maxie and Lemos then grabbed him, one on each side, pushing him against the wall. Sgt. Ward did not touch Felix, but looked on while the incident occurred. Felix was then taken into Sgt. Ward's office to discuss his refusal to work. This incident in the hallway outside of Sgt. Ward's office is the *only* incident on which Felix bases his claim for excessive force.[2/]

At his deposition, Felix at first did not remember sustaining any injuries from the incident. Then he

---

[2]This is plaintiff's version of the facts. Defendants have given sworn statements of their own versions. Officer Maxis recalled moving Felix to one side of the hallway to make room for personnel rushing through to the emergency room. Officer Lemos recalled bracing Felix against a wall inside Sgt. Ward's office on one occasion in order to place handcuffs on him. Sgt. Ward remembered no use of force on Felix, and nothing unusual about the incident.

remembered that he suffered pain at the time, "a little bruising," and soreness for "three or four, five" days. Felix did not seek any medical attention for these alleged injuries. Felix emphasized that the incident in the hallway was only a small part of a system-wide campaign to wage "psychological warfare" against him. And in a concluding statement at his deposition, Felix characterized "the little damage that was done physically to me" as minor in relation to his allegations of an "overall" pattern of "mental and physical abuse."[3]

Each defendant pleaded qualified immunity as an affirmative defense in his answer to the amended complaint, and also raised qualified immunity in a motion for summary judgment, filed May 22, 1989. The District Court denied the summary judgment motion in a written order on July 11, 1989. Appendix, pp. A-8 - A-13.

The defendants appealed the denial of their qualified immunity defense, invoking jurisdiction in the United States Court of Appeals under 28 United States Code section 1291 and *Mitchell v. Forsyth*, 472 U.S. at 530. On July 10, 1991, the Ninth Circuit issued an opinion affirming the District Court's denial of summary judgment. Appendix, pp. A-1 - A-7. The Ninth Circuit held that petitioners in this case are not entitled to qualified immunity. The court ruled that it has been clearly established since at least 1985 that "it is not the degree of injury which makes out a violation of the eighth amendment. Rather, it is the use of official force or

---

[3]However, as noted above, those other claims were dismissed before service of process.

authority that is 'intentional, unjustified, brutal and offensive to human dignity.'" 939 F.2d at 701 (quoting *Meredith v. Arizona*, 523 F.2d 481, 484 (9th Cir. 1975). Defendants' petition for rehearing and suggestion for rehearing *en banc* were denied on August 30, 1991. Appendix, p. A-14.

## REASONS FOR GRANTING THE WRIT

### I. THE NINTH CIRCUIT'S DECISION IN THIS CASE CONFLICTS WITH PRINCIPLES STATED IN SUPREME COURT CASES ON QUALIFIED IMMUNITY.

Ignoring this Court's clear policy to permit insubstantial suits against government officials to be disposed of prior to trial, the Ninth Circuit held that defendants in this case must go to trial on plaintiff's allegation that he was pushed across a hallway by an angry officer.

Even though federal courts today cannot agree whether "significant" injury is required to state a claim for Eighth Amendment excessive force, and even though federal courts today cannot agree whether such injuries as cuts, bruises, and loosened teeth are "significant," the Ninth Circuit says that the law in 1985 was so clearly established that these correctional officers must have known that it would violate the Eighth Amendment to shove a quarrelsome, handcuffed inmate across a hallway, causing him a "little bruising" as a result. This ruling defies many years of admonitions by this Court to release

government officials from the burdens of insubstantial litigation whenever possible by immunizing conduct that was not *clearly* unlawful at the time. See, e.g., *Malley v. Briggs*, 475 U.S. 335, 341 (1986) (qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law").

For seventeen years, this Court has balanced individual interests in vindicating constitutional rights with governmental and social interests in curtailing excess litigation by affording qualified immunity to government officials. See *Anderson v. Creighton*, 483 U.S. 635, 638-641 (1987); *Harlow v. Fitzgerald*, 457 U.S. 800, 806-808 (1982); *Scheuer v. Rhodes*, 416 U.S. 232, 238-249 (1974). In *Harlow*, the Court discarded the old subjective component of "good faith" immunity, which asked whether a government official acted with "an impermissible motivation." See *Wood v. Strickland*, 420 U.S. 308, 322 (1975). The new standard announced in *Harlow* focuses on the objective reasonableness of an official's conduct in light of legal rules that are "clearly established."[4] 457

---

[4]In *Anderson v. Creighton*, 483 U.S. at 639-640, the Court made it clear that the "clearly established" test operates at a high level of specificity:

> "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action is protected by qualified immunity unless the very action in question has previously been held unlawful, but it is to say that in the light of pre-existing law the unlawfulness must be apparent."

U.S. at 818. The express purpose for the switch from a subjective standard to an objective standard was to "avoid excessive disruption of government and permit the resolution of many insubstantial claims on summary judgment." *Harlow*, 457 U.S. at 818.

Though the Court of Appeals' decision in this case pays lip service to the current qualified immunity standard,[5] the substance of the holding repeals the rule. For rather than deciding whether a reasonable officer would have understood that the defendants' alleged *conduct* would violate the Constitution, the Ninth Circuit flouted this Court's qualified immunity rules by holding that the defendants' alleged *motive* violates the Constitution. See *Harlow*, 457 U.S. at 815-818.

If allowed to stand, this decision will have a grim effect on Eighth Amendment excessive-force litigation in the Ninth Circuit. The inescapable implication of this decision is that qualified immunity is unavailable to an officer who applies any physical force whatsoever -- even a pinch on the cheek, or a clap on the shoulder -- whenever the prisoner makes allegations (otherwise

---

*Anderson v. Creighton*, 483 U.S. at 640 (citations omitted).

[5]"Under the state of the law in 1985, reasonable officers should have been on notice, with the specificity required by *Anderson v. Creighton*, 483 U.S. 635 [] (1987), that this type of conduct would violate a prisoner's constitutional rights." 939 F.2d at 701; Appendix, p. A-5.

constitutionally uncognizable) that raise the specter of malice. Further, the specter of malice having been raised, every trivial physical-contact case may now be found to state a claim and may go to a jury.[6]

*Harlow* promised that, under the "clearly established" test, "an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." 457 U.S. at 818. The promise rings hollow for defendants, who have been held responsible for understanding in 1985 a standard that federal appeals judges in 1991 are still debating. Because the Ninth Circuit's decision in this case conflicts with longstanding principles of qualified immunity, and because the decision frustrates the strong policy reasons supporting the qualified immunity defense, plenary review of the decision is compelled.

---

[6]The decision thus threatens to turn section 1983 into "a font of tort law," against all of this Court's warnings to the contrary. *Daniels v. Williams*, 474 U.S. 327, 332 (1986); *Paul v. Davis*, 424 U.S. 693, 701 (1976).

## II. THE NINTH CIRCUIT'S DECISION IN THIS CASE CONFLICTS DIRECTLY WITH DECISIONS OF THE FIFTH CIRCUIT HOLDING THAT A PRISONER MUST SHOW A "SIGNIFICANT" INJURY TO STATE A CLAIM FOR EXCESSIVE FORCE UNDER THE EIGHTH AMENDMENT, AN ISSUE THAT IS PENDING BEFORE THIS COURT IN *HUDSON v. McMILLIAN.*

Not only did the Ninth Circuit refuse to follow this Court's directions on applying qualified immunity doctrine, but in its refusal it fashioned a new standard on Eighth Amendment excessive force that conflicts directly with a rule of the Fifth Circuit. The Fifth Circuit's rule, which requires a prisoner to show "significant injury" to state a claim for excessive force, is now pending before this Court in *Hudson v. McMillian*, No. 90-6531.[7]

Elaborating on its ruling that defendants in this case are not entitled to qualified immunity, the Ninth Circuit said that the cases decided by 1985 "demonstrate that it is not the degree of injury which makes out a violation of the eighth amendment. Rather, it is the use of official force or authority that is intentional, unjustified, brutal and offensive to human dignity." 939 F.2d at 701 (quoting *Meredith v. Arizona*, 523 F.2d 481, 484 (9th Cir. 1975).)

The holding that extent of injury is not a

---

[7]Petition for writ of certiorari granted ___ U.S. ___, 111 S. Ct. 1679, 114 L. Ed. 2d 75 (1991). Argued Nov. 13, 1991.

determining factor in an Eighth Amendment claim is not only a new rule (see Part III, below), but it directly conflicts with the Fifth Circuit's rule that an inmate must show "significant injury" to state a claim for excessive force under the Eighth Amendment. See, e.g., *Wise v. Carlson*, 902 F.2d 417, 417-418 (5th Cir. 1990); *Huguet v. Barnett*, 900 F.2d 838, 841 (5th Cir. 1990). Under the Fifth Circuit rule, an inmate must prove:

> "1. a significant injury, which
>
> 2. resulted directly and only from the use of force that was clearly excessive to the need, the excessiveness of which was
>
> 3. objectively unreasonable, and
>
> 4. the action constituted an unnecessary and wanton infliction of pain." *Huguet v. Barnett*, 900 F.2d at 841.

This Court issued a writ of certiorari to the Fifth Circuit because of uncertainty over this very question. Review in *Hudson v. McMillian* was limited to the question whether the Fifth Circuit applied the correct legal test when determining that a prisoner's rights under the Cruel and Unusual Clause were not violated as a result of a single incident of force which did not cause a significant injury. This Court's decision to review *Hudson* demonstrates that the standard for assessing prisoners' Eighth Amendment excessive-force claims is ripe for clarification.[8/]

---

[8]Evidence of the need for clarification does not end with *Hudson*. Besides creating a conflict with the Fifth Circuit, the decision in this case has also put the Ninth

The conflict between the circuits goes to the heart of defendants' qualified immunity claim, for if the federal circuits even now cannot agree on whether a "significant injury" is required to state an excessive force claim under the Eighth Amendment, how could it be said that a

---

Circuit at odds with itself. The holding conflicts with *White v. Roper*, 901 F.2d 1501, 1507 (9th Cir. 1990).

In *White,* the Ninth Circuit stated,

> "The amount and type of force used [by jail officers on a pretrial detainee] is disputed by the parties. However, White has not shown that he required or even that he requested medical treatment for the cut wrist and the [numerous] bruises he allegedly suffered. White does not allege that he lost consciousness at any time, or that he suffered any permanent injury. We conclude that White has not made a showing sufficient to establish that the use of force against him was 'excessive' or 'brutal.'" *Id.*

Further evidence of the need for clarification of Eighth Amendment excessive-force standards may be found also in the Fourth Circuit, where a closely divided *en banc* panel (6-4) determined that "verbal provocation alone" did not justify the use of baton blows upon a handcuffed prisoner. *Miller v. Leathers*, 913 F.2d 1085 (4th Cir. 1990) (*en banc*), cert. denied ___ U.S. ___, 111 S. Ct. 1018, 112 L. Ed. 2d 1100 (1991). Both the majority and the dissent cited *Whitley v. Albers*, 475 U.S. 312 (1986), in support of their respective arguments. *Miller v. Leathers*, 913 F.2d at 1087 (majority), 1089-1092 (dissent).

reasonable correctional officer in 1985 must have known that it would be cruel and unusual punishment for an officer to apply force to a verbally abusive prisoner, causing only a "little bruising" and some pain? It is particularly significant in this case that Felix alleges only minimal physical injury, because the case is otherwise devoid of any objective indicia of brutality.

This is not a case where torture was sadistically applied in a manner calculated to leave no scars. This is a shove across a hallway. Though defendants' alleged conduct may be characterized as intentional and even unjustified, it cannot fairly be described as "brutal" or "offensive to human dignity."[9] In this ordinary case, the extent of the injury is the only objective indication of the nature of the force that was applied. For this reason, the decision's disregard for the extent of Felix's injury works a profound change on the operation of the Eighth Amendment excessive force standard.

Because the Ninth Circuit's holding in this case conflicts directly with a Fifth Circuit decision which this Court is presently reviewing, plenary review of this decision is compelled.

---

[9]The Ninth Circuit made much of Felix's personal dignity, especially in connection with his allegation that Maxis spit on the floor. But there is no reason to believe that the "human dignity" language, quoted from *Meredith v. Arizona*, 523 F.2d at 484, was intended to make a prisoner's personal feelings of affront the measure of an Eighth Amendment violation.

## III. THE NINTH CIRCUIT'S DECISION IN THIS CASE CONFLICTS WITH THE PRINCIPLE THAT THE EIGHTH AMENDMENT DOES NOT RECOGNIZE MINOR DEPRIVATIONS IN THE NATURE OF COMMON-LAW TORTS.

The decision fundamentally conflicts with prevailing principles of Eighth Amendment law on excessive force. By refusing to consider the smallness of plaintiff's injuries, and by focusing on the view that Officer Maxie "used his authority intentionally and gratuitously to degrade Felix's dignity," this decision overthrows the fundamental principle that, "Not every governmental action affecting the interests or well-being of a prisoner is subject to Eighth Amendment scrutiny . . .. 'After incarceration, only the "unnecessary and wanton infliction of pain" . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment.'" *Whitley v. Albers*, 475 U.S. 312, 319 (1986) (quoting *Ingraham v. Wright*, 430 U.S. 651, 670 (1977)).

The primary standard for evaluating a prisoner's excessive force claim is the balancing test first enunciated in *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973) (Friendly, J.), cert. denied sub nom. *John v. Johnson*, 414 U.S. 1033 (1973), and adopted by this Court in *Whitley v. Albers*, 475 U.S. 312, 320-321 (1986).[10] To determine whether force was used unnecessarily and wantonly to inflict pain, a court must consider "'such factors as the

---

[10] The Ninth Circuit adopted the test in *Meredith v. Arizona*, 523 F.2d 481, 484 (9th Cir. 1975).

need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of the injury inflicted.'" *Id.* at 321 (quoting *Johnson v. Glick*, 481 F.2d at 1033).

Because *Whitley* was a case involving shots fired to quell a major prison disturbance, the *Whitley* opinion did not repeat Judge Friendly's oft-quoted statement that "Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights." *Johnson v. Glick*, 481 F.2d at 1033. But a number of courts of appeals, including the Ninth Circuit in *Meredith v. Arizona*, have adopted that precept, as defendants pointed out in their briefs below.

Although the Court of Appeals noted that it "may often be correct" that a mere push or shove does not amount to cruel and unusual punishment, it distinguished Felix's allegations from that principle because "Felix does not allege that he was merely pushed. Rather, he asserts first, that Officer Maxie used his position of authority intentionally and gratuitously to degrade his dignity, and second, that Maxie, with Sergeant Ward's apparent approval, threw him across a hallway and against a wall, causing bruising, soreness, and emotional damage." 939 F.2d at 701; Appendix, p. A-7.

The decision thus holds that although minor force causing minor injury may not be cruel and unusual in itself, minor force causing minor injury may be cruel and unusual when accompanied with an allegation that an officer used force "intentionally and gratuitously to degrade [the inmate's] dignity." In other words, the Ninth Circuit's

decision holds that an otherwise constitutional application of force is transformed into cruel and unusual punishment when it is coupled with a gratuitous intent to degrade an inmate's dignity. The decision makes an officer's intent to affront an inmate's dignity the *sine qua non* of cruel and unusual physical punishment. Taken to its logical, and not very distant, extreme, the decision makes "the least touching of another in anger" a constitutional violation. That result is banned by the principle that the Eighth Amendment does not recognize minor deprivations in the nature of common-law torts.[11]

This Court recently reiterated with unmistakable clarity in *Wilson v. Seiter*, ___ U.S. ___, 111 S. Ct. 2321 (1991) that every Eighth Amendment violation has both a subjective component (a "sufficiently culpable state of mind") and an objective component (a "sufficiently serious" deprivation). ___ U.S. at ____, 111 S. Ct. at 2324. By focusing exclusively on the alleged subjective state of mind of the officers and ignoring the objective lack of a significant physical injury, the decision in this case conflicts fundamentally with the longstanding principle that "only those deprivations denying 'the minimal civilized measure of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation." *Wilson v. Seiter*, ___ U.S. at ___, 111 S. Ct. at 2399 (quoting *Rhodes v. Chapman*, 452 U.S. 337, 347 (1981)). The Ninth Circuit

---

[11]At best, the decision states a new standard, which should not have been applied retroactively to defeat defendants' qualified immunity argument. See Part I, above.

departed from this principle when it held that correctional officers in 1985 should have understood that *any* physical force is cruel and unusual if the officer intends to degrade the inmate's dignity.

Because the decision's holding conflicts with fundamental principles of Eighth Amendment law announced by this Court, plenary review of the decision is appropriate.

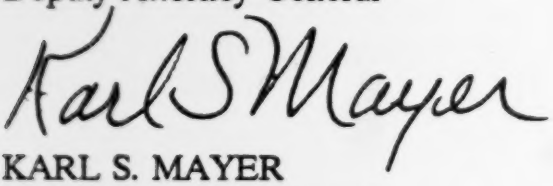
## CONCLUSION

For the stated reasons, petitioners respectfully request that their Petition for a Writ of Certiorari be granted.

DATED: November 27, 1991

DANIEL E. LUNGREN
Attorney General
of the State of California

GEORGE WILLIAMSON
Chief Assistant
Deputy Attorney General



KARL S. MAYER
Deputy Attorney General
(Counsel of Record)

SUSAN DUNCAN LEE
Deputy Attorney General

Attorneys for Petitioners

No. 91 -

In The

**SUPREME COURT OF THE UNITED STATES**

October Term, 1991

---

DANIEL McCARTHY, et al.,

Petitioners,

v.

SCOTT EMERSON FELIX,

Respondent.

---

# APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

---

Daniel E. Lungren, Attorney General
of the State of California
George Williamson, Chief Assistant
Attorney General
Karl S. Mayer
Deputy Attorney General
(Counsel of Record)
Susan Duncan Lee
Deputy Attorney General
455 Golden Gate Avenue, Suite 6200
San Francisco, CA 94102
Telephone: (415) 703-1732

Attorneys for Petitioners

---

S. Hell

**FOR PUBLICATION**

# UNITED STATES COURT OF APPEALS
# FOR THE NINTH CIRCUIT

DOCKET
ADM-SF
CIV-SF
CR-SF
Entered 7/15/91
Date

SCOTT EMERSON FELIX,
*Plaintiff-Appellee,*

v.

DANIEL J. MCCARTHY, Director of The Department of Corrections; P.J. MORRIS; J. CAMPOY; DANIEL VASQUEZ; MORRIS, Lt., et al.,
*Defendants-Appellants.*

No. 89-16020

D.C. No.
CV-85-8777-AJZ

OPINION

Appeal from the United States District Court
for the Northern District of California
Alfonso J. Zirpoli, Senior District Judge, Presiding

Argued and Submitted
December 11, 1990—Pasadena, California

Filed July 10, 1991

Before: Joseph T. Sneed, Mary M. Schroeder and William C. Canby, Jr., Circuit Judges.

Opinion by Judge Canby

## SUMMARY

### Constitutional Law

Affirming a district court denial of summary judgment on the basis of qualified immunity, the court of appeals held that, under the state of the law in 1985, reasonable prison officers

should have been on notice that the unprovoked abuse and beating of an inmate would violate the inmate's constitutional rights.

Prisoner Scott Emerson Felix was verbally abused and beaten by prison guards at San Quentin. Felix brought a civil rights action against the guards alleging that they used excessive force against him in March 1985. The guards asserted that they were entitled to qualified immunity because it was not clearly established at that time that their conduct would violate Felix's clearly established constitutional rights. The district court denied the guards' motion for summary judgment on the basis of qualified immunity.

[1] Under the state of the law in 1985, reasonable officers should have been on notice, with the specificity required by *Anderson v. Creighton*, that the type of conduct alleged by Felix would violate a prisoner's constitutional rights. [2] In *Meredith*, decided in 1975, the court concluded that a prisoner had stated a cause of action where he alleged that a prison guard, without provocation, had struck him rendering him "totally handicapped" for a period. [3] By March 1985, other circuits and district courts had reached comparable conclusions. [4] Because the court concluded that Felix had made a sufficient showing the appellant-guards violated clearly established constitutional rights of which a reasonable officer would have known, the court affirmed the district court's denial of summary judgment based on qualified immunity.

---

## COUNSEL

Sandy Duncan Lee, Deputy Attorney General, San Francisco, California, for the defendants-appellants.

Alfred C. Peiffer, Jr., McCutchen, Doyle, Brown & Enersen, San Francisco, California, for the plaintiff-appellee.

---

## OPINION

CANBY, Circuit Judge:

Appellants Luis S. Lemos, Gregory Maxie and Paul Ward, prison guards at San Quentin, appeal the district court's denial of their motion for summary judgment on the basis of qualified immunity. Scott Felix, a prisoner at San Quentin, brought a civil rights action against the guards alleging that the guards used excessive force against him in March 1985. The guards assert that they are entitled to the defense of qualified immunity because it was not clearly established in March 1985 that the guards' conduct would violate Felix's clearly established constitutional rights. We affirm.

## BACKGROUND

Felix brought a section 1983 action against the prison guards alleging violation of his eighth amendment right not to be subject to cruel and unusual punishment. Accepting Felix's deposition testimony and all reasonable inferences drawn from it as true, the facts show the following:

Felix was employed in the prison hospital. In March 1985, while Felix was mopping the floors in the hospital, Officer Maxie approached Felix, deliberately spat on the floor at Felix's feet, and ordered Felix to clean it up. When Felix refused, Maxie handcuffed Felix, pushed him into a wall, then led him to Sergeant Ward's office. On the way to the office, Maxie verbally assaulted Felix with insults and threatened to take Felix's job away.

While Felix and Maxie waited for Ward to become available, Felix leaned against the wall in the hallway outside of Sergeant Ward's office. When Sergeant Ward approached, Officer Maxie told him that Felix was refusing to work. Felix disagreed and told Ward that Maxie was crazy and that he was lying. In response, Maxie threw the handcuffed prisoner

across the hallway into the wall on the opposite side, about seven to nine feet away. Felix's left shoulder and left side of his face made contact with the wall. Then Officer Lemos joined Officer Maxie. The two officers grabbed Felix, one on each side, and took him into Sergeant Ward's office. There, one of the officers pushed Felix, who was still handcuffed, one more time.

Felix testified that he suffered bruises, soreness, and emotional distress from the incident. He was afraid to seek medical attention for his injuries and quit his job because he was afraid of the guards in the hospital.

The guards moved for summary judgment on the ground that they did not violate Felix's constitutional rights. The district court denied the motion. The court concluded that the defendants were not entitled to summary judgment on the basis of qualified immunity and that the defendant's qualified immunity argument merely restated their argument that Felix's rights were not violated.

## ANALYSIS

### 1. Jurisdiction

Felix argues that we lack jurisdiction over the guards' claims because the guards failed to raise the qualified immunity defense in the district court. We disagree. The guards' motion for summary judgment, based on their contention that they did not use unreasonable force, includes a reference to qualified immunity. Felix responded to this motion by arguing that qualified immunity was not available to the guards. The district court addressed the issue and concluded that the guards were not entitled to the defense. We conclude that the matter is properly before us on appeal.

### 2. Qualified Immunity

The guards argue that they are entitled to qualified immunity because they did not violate any clearly established con-

stitutional right of which a reasonable person would have known. According to the guards: "In light of pre-existing law, reasonable correctional officers would believe that minor force resulting in minor injury (*i.e.*, a 'm,ere [sic] push or shove') was constitutional."

Although the principle cited by appellants may often be correct, its application to the facts of the present case is not. Felix does not allege that he was merely pushed. Rather, he asserts first, that Officer Maxie used his position of authority intentionally and gratuitously to degrade his dignity, and second, that Maxie, with Sergeant Ward's apparent approval, threw him across a hallway and against a wall, causing bruising, soreness, and emotional damage. Moreover, Felix contends that Officers Maxie and Lemos pushed him yet another time in Sergeant Ward's office. Again, the conduct was stated to be unprovoked. Thus, the principle offered by the appellants does not govern Felix's claim.

[1] Under the state of the law in 1985, reasonable officers should have been on notice, with the specificity required by *Anderson v. Creighton*, 483 U.S. 635 (1987), that this type of conduct would violate a prisoner's constitutional rights. In their brief, the appellants concede that:

> Early in 1985, a reasonable correctional officer in California would have understood that he would violate the Constitution by delivering strong blows upon a prisoner for no purpose, using force that could be characterized as "intentional, unjustified, brutal, and offensive to human dignity." *Meredith v. Arizona*, 523 F.2d at 484.

*Meredith v. Arizona*, 523 F.2d 481 (9th Cir. 1975), provides the standard in this circuit for determining whether an officer's conduct constitutes excessive force. Although the force allegedly used against Felix was not maximum, it properly

falls within the description of "strong blows ... for no purpose."

[2] *Meredith* was decided in 1975. In *Meredith*, we concluded that a prisoner had stated a cause of action where he alleged that a prison guard, without provocation, struck him in the solar plexus while he was suffering from an emphysema attack, rendering him "totally handicapped" for a period.[1] Meredith was treated with oxygen for four hours; he suffered no lasting injury.

[3] By March 1985, other circuits had reached comparable conclusions. For example, in 1980, the Fourth Circuit held that "the *unjustified* striking, beating, or infliction of bodily harm upon a prisoner gives rise to liability under 42 U.S.C. § 1983." *King v. Blankenship*, 636 F.2d 70, 72 (4th Cir. 1980) (emphasis added). In *Blankenship*, the court concluded that the prisoner stated a cause of action where a guard grabbed the prisoner's beard and threw him to the floor, causing a portion of the beard to be torn from the prisoner's face and inflicting some cuts and bruises. Similarly, on facts resembling the present case, a district court in 1976 found a cause of action when a guard initiated an unprovoked altercation with a prisoner and used force maliciously, causing some injury to the prisoner's face and neck. *Vargas v. Correa*, 416 F.Supp. 266 (S.D.N.Y. 1976). *See also Wilson v. White*, 656 F.Supp. 877, 879 (S.D.N.Y. 1987) (attack on prisoner "which is not part of an attempt to maintain or restore discipline violates the inmate's due process right to be free from unprovoked attack"). These cases demonstrate that it is not the degree of injury which makes out a violation of the eighth

[1] *Rutledge v. Arizona Bd. of Regents*, 660 F.2d 1345, 1352 (9th Cir. 1981), *aff'd sub nom. Kush v. Rutledge*, 460 U.S. 719 (1983), does not acknowledge, as the guards assert, that the *Meredith* analysis rested on the severity of the injury alleged. *Rutledge* repeats our statement in *Meredith* that we would not decide whether less *reprehensible* conduct would suffice to state a claim. *Rutledge*, 660 F.2d at 1352.

amendment. Rather, it is the use of official force or authority that is "intentional, unjustified, brutal and offensive to human dignity." *Meredith*, 523 F.2d at 484.

The appellants cite numerous cases in support of their assertion that the guards could not have known that the infliction of minor injuries would violate a clearly established constitutional right. *See e.g., Hines v. Boothe*, 841 F.2d 623 (5th Cir. 1988); *Marquez-DeJesus*, 1989 U.S. Dist. Lexis 716 (S.D.N.Y 1989). These cases, however, did not involve an unprovoked and unjustified attack by a prison guard; the prisoners were either violating prison rules or the guards were acting on a reasonable but mistaken belief that the prisoner posed a security threat. On Felix's evidence, no such situation existed here.

[4] Because we conclude that Felix has made a sufficient showing that the appellant-guards violated clearly established constitutional rights of which a reasonable officer would have known, we affirm the district court's denial of summary judgment based on qualified immunity.

3. Sanctions

Felix requests that we sanction the guards for bringing a frivolous appeal. Felix asserts that the appeal is frivolous because the issue of qualified immunity was not raised below and is not appealable. Because we conclude that the issue was raised below and is appealable, we deny Felix's request for sanctions.

The order is AFFIRMED.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

| | |
|---|---|
| SCOTT EMERSON FELIX,<br><br>Plaintiff,<br><br>vs.<br><br>DANIEL J. McCARTHY, Director of the Department of Corrections, et al.,<br><br>Defendants. | No. C85 8777 AJZ<br><br>ORDER |

This suit arises under 42 U.S.C. § 1983. Plaintiff Scott Felix, a California state prisoner, contends that his Eighth Amendment rights were violated when he was allegedly assaulted by correctional officers at San Quentin Correctional Facility. Defendants also move to strike one of plaintiff's supporting declarations. Plaintiff requests the court's assistance with respect to a discovery dispute.

## MOTION FOR SUMMARY JUDGMENT

Defendants move for summary judgment.

## FACTS

One day approximately in March, 1985, plaintiff and defendant Gregory Maxis, a correctional officer at San Quentin, had a disagreement while plaintiff was performing his work assignment. Maxis took plaintiff to see defendant Paul Ward, Maxis's superior. Defendant Luis Lemos, another correctional [officer] was present at Ward's office.

At some point during the meeting in Ward's office, defendants placed plaintiff against a wall. Maxis held plaintiff in place by pushing on the back of his neck. Lemos assisted by holding one of plaintiff's arms.

## DISCUSSION

Defendants contend that they are entitled to summary judgment because the undisputed material facts fail to support plaintiff's 42 U.S.C. § 1983 claim.

A moving party is entitled to summary judgment

> if the pleadings [and] depositions, . . . together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Fed. R. Civ. P. 56(c).

This court has already determined that plaintiff states a claim under the Eighth Amendment. See August 7, 1986 Order at 6-7. In order to prevail on his claim, plaintiff must prove "the unnecessary and wanton infliction of pain." Whitley v. Albers, 475 U.S. 312, 319 (1986) (citations omitted).

This required showing "ultimately turns on 'whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm." Id. at 320-21 (quoting Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), cert. denied sub nom. John v. Johnson, 414 U.S. 1033 (1973)). In making this determination, courts look at "'such factors as the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of the injury inflicted.'" Id. at 321 (quoting Johnson, 481 F.2d at 1033).

Defendants, relying on deposition testimony of plaintiff and Lemos, and on declarations of Maxis and Ward, state that Maxis escorted plaintiff to Ward's office when plaintiff failed to complete his job assignment; that Maxis explained that plaintiff refused to complete his work, and that plaintiff told Ward that Maxis was trying to harass plaintiff; and that at one point during the meeting, while plaintiff was being handcuffed, or after he was handcuffed, plaintiff was held up against a wall by Maxis and Lemos.

Defendants assert, on the basis of these facts, that they did not subject plaintiff to excessive force. To support further this assertion, defendants state that they did not file a written report or summon medical personnel following the incident, which are required when excessive force is used, and that plaintiff did not seek medical attention.

Plaintiff, also relying on his deposition testimony, characterizes the events differently. First, plaintiff did not merely refuse to do his job. Rather, Maxis spat on the floor and ordered plaintiff to mop it up, and plaintiff refused.

Second, Maxis did not merely escort plaintiff to Ward's office. Maxis handcuffed plaintiff, pushed plaintiff into a wall, took him to Ward's office, and before entering threatened to take plaintiff's job away from him.

Finally, while in Ward's office, defendants did not merely hold plaintiff up against a wall before or after handcuffing him. Defendants threw plaintiff against a wall

while plaintiff was handcuffed. Plaintiff testified that he suffered bruises and emotional distress from the incident.

Plaintiff's deposition testimony sheds light on "the need for the application of force, the relationship between the need and the amount of force that was used, [and] the extent of the injury inflicted," Whitley, 475 U.S. at 321, in this case. At most, defendants have put these facts in issue. Therefore, defendants fail to demonstrate "that there is no genuine issue as to any material fact and that [they] are entitled to a judgment as a matter of law." See Fed. R. Civ. P. 56(c).

Alternatively, defendants content that they are entitled to summary judgment on the basis of qualified immunity.

Defendants are protected by qualified immunity only insofar as their conduct "does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). Defendants do not dispute that the "clearly established" standard applicable in March, 1985, was that which was enunciated in Whitley v. Albers, 475 U.S. 312 (1986). Rather, they assert that their conduct did not violate that standard.

Defendants' qualified immunity argument merely restates their § 1983 argument. In effect, defendants argue that they are entitled to qualified immunity because they did not violate plaintiff's Eighth Amendment right. If they did not violate that right, however, they need not rely on qualified immunity. Therefore, their qualified immunity argument is redundant. See Albers v. Whitley, 743 F.2d 1372, 1376 (9th Cir. 1984) (a finding that defendants violated clearly established Eighth Amendment right is inconsistent with a finding of good faith or qualified immunity -- the two findings are mutually exclusive), rev'd on other grounds, 765 U.S. 312 (1986). Accordingly, defendants' motion for summary judgment is denied.

## DISCOVERY REQUEST

In his opposition papers, plaintiff requests that the court order the Attorney General's office to cooperate in plaintiff's discovery efforts. In support of his request, plaintiff relies on Fed. R. Civ. P. 56(f) (when affidavits unavailable to oppose summary judgment).

The claims on the basis of which plaintiff is attempting to conduct discovery are not the claims on which defendants' summary judgment motion is based. Accordingly, plaintiff's reliance on Rule 56(f) is inappropriate.

At an early stage of this action, the court dismissed plaintiff's conspiracy claims for improper venue because the alleged incidents took place at Folsom, where plaintiff was no longer incarcerated. See August 7, 1986 Order at 1-2, 9. Plaintiff apparently is attempting to conduct discovery in order to support a motion for reconsideration on the basis that the conspiracy extended to San Quentin as well. See Plaintiff's Status Conference Statement for January 17, 1989 at 2-3.

If the parties have a disagreement concerning discovery, the Federal Rules provide both parties with adequate direction as to the appropriate steps to take. Plaintiff's request is not one of those steps. Accordingly, plaintiff's request is denied.

## MOTION TO STRIKE

Defendants filed with their reply papers a motion to strike portions of one of plaintiff's supporting declarations. The offending portions refer only to matters relevant to plaintiff's discovery request. In light of the court's denial of plaintiff's discovery request, defendants' motion to strike is denied.

Accordingly,

IT IS HEREBY ORDERED that:

1. Defendants' motion for summary judgment is denied.

2. Plaintiff's request for a discovery order is denied.

3. Defendants' motion to strike is denied.

DATED: July 11, 1989

Alfonso J. Zirpoli
United States District Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| SCOTT EMERSON FELIX,<br><br>Plaintiff-Appellee,<br><br>v.<br><br>DANIEL J. McCARTHY, Director of the Department of Corrections; P.J.MORRIS; J. CAMPOY; DANIEL VASQUEZ; MORRIS, Lt., et al.,<br><br>Defendants-Appellants. | ) | CA No. 89-16020<br>DC No. CV-85-8777-AJZ<br><br>ORDER |

BEFORE: SNEED, SCHROEDER AND CANBY, CIRCUIT JUDGES.

The panel has voted unanimously to deny the petition for rehearing and suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote to rehear the matter en banc.

The petition for rehearing is hereby denied and the suggestion for rehearing en banc is rejected.

CERTIFICATE OF SERVICE BY MAIL

No. 91-

---

*DANIEL McCARTHY, et al., Petitioners,*

v.

SCOTT EMERSON FELIX, *Respondent.*

---

I, KARL S. MAYER, state that I am a member of the Bar of the Supreme Court of the United States; my business address is 455 Golden Gate Avenue, Room 6200, in the City and County of San Francisco, State of California; that on November 27, 1991, I served the required number of true copies of the

Petition for Writ of Certiorari

in the above-entitled matter on counsel for respondent and the Clerk of the United States Court of Appeals for the Ninth Circuit, by placing same in envelopes addressed as follows:

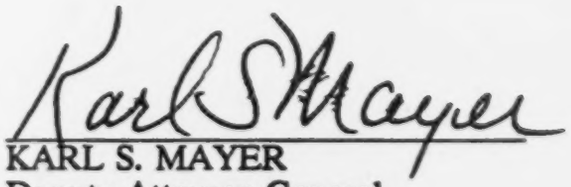
Cathy Catterson, Clerk
U. S. Court of Appeals, Ninth Circuit
121 Spear Street
San Francisco, CA 94119-3939

Alfred Pfeiffer
McCutchen, Doyle, Brown & Enersen
Three Embarcadero Center
San Francisco, CA 94111
Telephone: (415) 393-2000

Attorney for Respondent

Said envelopes were then sealed and deposited in the United States Mail at San Francisco, California, with the postage thereon fully prepaid.

DATED: November 27, 1991



KARL S. MAYER
Deputy Attorney General
of the State of California